Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

AUGUSTIN SANCHEZ,
PETITIONER

—VS—

UNITED STATES OF AMERICA.
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Petitioner

March 3, 1998

29 pp

QUESTION PRESENTED

DID THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY APPLY THIS COURT'S DECISION IN OREGON V. KENNEDY, WHEN IT AFFIRMED THE PETITIONER'S CONVICTIONS AND SENTENCE IMPOSED BY THE DISTRICT COURT?

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TO THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Augustin Sanchez petitions this Court to review the judgment of the Unites States Court of Appeals for the Eleventh Circuit, which answered no to the question presented.

OPINION BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit appears in the petitioner's Appendix ("App.") at 1a - 2a, and was unreported December 15, 1997.

JURISDICTION

The Judgment of the Court of Appeals was entered December 14, 1997. This Court has Jurisdiction under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall ... be subject for the same offense to be twice put In Jeopardy of life or Ilmb ..." Id.

U.S. Const. Amend. V (excerpt)

"No person shall ... be deprived of ... liberty, or property, without due process of law." Id.

U.S. Const. Amend. V (excerpt)

STATEMENT OF THE CASE

On June 9, 1995, Augustin Sanchez, Odilio Gonzales. and Lazaro Hernandez, were Indicted In the United States District Court for the Southern District of Florida and charged with: (1) conspiring to Import marijuana Into the United States between May, 1994 and June, 1995' In violation of 21 U.S.C. §952(a) and §963; (2) importing marijuana Into the United States on June 2, 1995, In violation of 21 U.S.C. §952(a); (3) conspiring to possess with Intent to distribute both marijuana and cocaine between May, 1994 and June, 1995. In violation of 21 U.S.C. §841(a)(1) and 846; (4) possessing with Intent to distribute cocaine on February 2, 1995, In violation of 21 U.S.C. §841(a)(1); and (5) possessing with Intent to distribute marijuana on June 2, 1995, In violation of 21 U.S.C. §841(a)(1).

In January 1996 codefendant Odlilo Gonzales entered Into a plea agreement with the government. On April 16, 1996- the Honorable Lenore C. Nesbitt Imposed a prison sentence of 235 months upon Mr. Gonzales. Trial for the remaining two defendants was scheduled for and did so commence on Monday' July 8, 1996. 1/

On the second day of trial, July 9, 1996, the Dlstrict Court entertained arguments on pending motions. Defense counsel for the petitioner sought additional Information concerning three

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1/ This was the petitioner's first trial which ended In a mistrial.

confidential informants whose activities came to light during the discovery process. In particular, defense counsel had proffered that the Informants and agents In the Instant case were part of "Operation Skymaster" - a Customs operated undercover operation centered in Mobile, Alabama.

The "Skymaster" operation had come under attack In Alabama when It was discovered that some of the Informants were extorting money from the targets of the investigation behind the backs' of their control agents. As a direct result, several Investigations had In fact been compromised. Petitioner's defense counsel had requested that the District Court require the government to produce information concerning these corrupt activities, since the Instant case derived therefrom the same undercover operation.

When Assistant U.S. Attorney ("AUSA") Richard Byrne acknowledged that he had intended to call at least two of the confidential informants as witnesses, the Court thereupon ruled that defense counsel could question the informants about their connection to "Operation Skymaster."

Having obtained this ruling, counsel for petitioner Sanchez gave an opening statement In which he fully conveyed to the Jury petitioner Sanchez' trial defense - that he Intended to attack the credibility of the three confidential informants that had orchestrated the investigation. Petitioner Sanchez' counsel disclosed he intended to turn the trial into an attack on the

corrupt activities revealed In "Operation Skymaster" and further noted that he intended to show that these informant-witnesses were still committing crimes while they were allegedly working for the government.

The government then began It's case-in-chief through two government agents and a records custodian. Before calling any of the Informants, however, the government put Odlilo Gonzales on the witness stand. Gonzales began his testimony Tuesday, July 9, 1996 and spanned several hours on Tuesday, and several hours into Wednesday, July 10, 1996. During cross-examination defense counsel predictably sought to Impeach his credibility by questioning him about the "other criminal activity" belatedly disclosed by AUSA Byrne. After admitting to several marijuana transactions, Gonzales was asked about other cocaine transactions. Gonzales Initially denied that there were any such transactions. (Tr. 439-45) 2/

Gonzales stated: "I did not speak to Mr. Byrne about any type of cocaine distribution." (Tr. 446). After Mr. Sanchez' counsel made both Gonzales and the Jury aware of AUSA Byrne's discovery disclosure. Gonzales retracted his answer and admitted that "we did talk about one cocaine distribution." (Tr. 447). The episode occurred In June or July of 1994 and Involved ten (10) kilograms of cocaine. (Tr. 447). When counsel then asked

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2/ "Tr" refers to verbatim trial transcript.

Gonzales who participated In this cocaine venture, Gonzales raised his voice and vigorously responded: "Exactly with Mr. Hernandez and with Mr. Sanchez." (Tr. 447). As Gonzales stated the names of Messrs. Hernandez and Sanchez, he forcefully pointed his finger at them. Petitioner Sanchez' trial counsel objected, and the District Court recessed to permit defense counsels for Sanchez and Hernandez to discuss the events and formulate a response to them.

During this recess, counsel for petitioner Sanchez spoke to AUSA Byrne and asked him whether he had been Informed by Gonzales that Gonzales had engaged In cocaine trafficking with Sanchez and Hernandez. AUSA Byrne stated he knew this Information and that he was aware of It when he prepared July 6, 1996 Discovery pleading. (Tr. 450 - 51) Counsel for petitioner Sanchez asked AUSA Byrne why he had failed to provide defense with all the Information he possessed about this cocaine transaction. AUSA Byrne replied that he did not consider the other transaction to fall within the scope of Fed. R. Evid. 404(b) because he considered It part of the same conspiracy as the charged offense. Id.

After discussing their remedies, counsel for petitioner Sanchez moved for a mistrial. (Tr. 453). Petitioner Sanchez' counsel advised the District Court as well as AUSA Byrne's admission that he was well aware of what Gonzales would say on cross-examination. (Tr. 451 - 53). Petitioner Sanchez' counsel

further indicated that the only reason they quest toned Gonzales in detail about the other cocaine transaction was in reliance upon AUSA Byrne's statements concerning kits lack of knowledge about the details of the transaction and the absence of any Rule 404(b) Notice.

So we are at a point now where the prosecutor was specifically asked the question whether or not he had any additional information. He told the Court no. We then, in reliance on that, asked the question. He had the information and we are not just prejudiced by it, but we are severely prejudiced by it, because it shows a prior drug trafficking involvement, other than this one offense, that connects the defendant and the witness. And quite frankly, most importantly, the government was aware and had this knowledge. And in direct response to the questions as to whether or not they needed addittonal information, whtch would have avoided the whole problem, said no; they didn't. And then the Court said, fine, then you will be held accountable to that. (Tr. 452 - 53).

Counsel for petitoner Sanchez subsequently explained that the decision to seek a mistrtal was arrived at reluctantly since both Hernandez and Sanchez, as well as their respectIve counsels, were pleased with the Jury that had been selected and charactertzed the Jury in his belief that they were "liberal and tolerant." Moreover, the Jury was chosen, tn part, after AUSA Byrne had exhausted all of his peremptory challenges while the

[defendants] still had several challenges remaining. Id.

The Court then asked AUSA Byrne to explain his conduct. AUSA Byrne advised that he had spoken to Gonzales "last Friday afternoon [July 5] for the first time." (Tr. 455). AUSA Byrne admitted that Gonzales disclosed that he had sold cocaine to Sanchez and Hernandez. 3/ "We didn't get into the specifics of the date or the amounts, but he did say with these two gentlemen." Id. Mr. Byrne deliberately did not disclose the alleged Involvement of Sanchez and Hernandez, because he did not view the evidence as governed by Rule 404(b). "I did not view the type of activity that he said he engaged in with these two gentlemen as being necessary to disclose any evidentiary detail, since it's within the same period as the conspiracy." (Tr. 455). Indeed, AUSA Byrne claimed that even Gonzales "viewed tints activity as part of the same conspiracy." (Tr. 455 - 56).

AUSA Byrne did not explain why he then chose to describe Gonzalez' conduct as "other criminal activity" when he disclosed it to defense counsels for Messrs. Sanchez and Hernandez. Rather, he claimed that the disclosure was simply "Inartfully drafted." (Tr. 456). However, AUSA Byrne had no explanation as to why he affirmatively told counsel and the Court, when asked, that he had no other information about the "other criminal activity."

3/ As discussed Infra, AUSA Byrne did not disclose that he and the case agents met with Gonzales a second time on Sunday, July 7, 1996. See Infra.

Mr. Byrne: I was asked if I had any other informatlon about these other activities, and I did say I did not have any other informatlon. I was taking that, though, your Honor ... I did say that. Yes, I did. (Tr. 458). 4/

Although he claimed that his misrepresentation was not "intentional," he admitted that he decided not to make the disclosure because "I viewed that as part of this case, as inextcicably intertwined ..." (Tr. 463). The District Court initlally ruled that AUSA Byrne "should have said involved in other criminal activity with these defendants." (Tr. 457). The Court also viewed with suspicion AUSA Byrneis explanation for not disclosing the involvement of the defendants when he was specifically told by the Court to provide additional informatlon. (Tr. 463). However, the Court recessed for the day until transcripts of relevant proceedings could be prepared.

AUSA Byrne felt that his trap was a fair trial tactic. Therein his written response to petitioner Sanchez' counsel's Motion for Mistrial AUSA Byrne stated: "Having elicited answers from Gonzales that he had distributed cocaine within the same time period as charged in the indictment, counsel proceeded at his peril, especially if he was uncertain of the answers he would receive."

4/ Moreoever, since AUSA Byrne did not attempt to determine "the specifics of the date or the amounts'" his conclusion that the evidence fell outside of Rule 404(b) was apparently made in ignorance.

After hearing AUSA Byrne's explanations, the Court was still "very concerned" about his conduct and told him so. (Tr. 480).

So, I consider this a very serious matter, Mr. Byrne. You know 59 defense attorneys in the Southern District of Florida that have been Indicted. Every time a defense attorney does something wrong, apparently they get Indicted. And a prosecutor does something like this and potentially aborts a four-day trial, and we are Just supposed to say, Sorry, do this trial another day. I mean, this Is something I'm really considering very serious. I mean, [I] could Issue a rule to show cause for you for a discovery violation. I could have another hearing on the matter. I could send this matter to a grievance committee. I mean four precious days, this Jury trial. You know how difficult It Is to select a Jury. And here we are now with this problem.

And It's not enough of an answer, well, as you said yesterday, well, their clients knew about their Involvement. If we had a videotape of this courtroom, I can tell you from the look In those attorneys' faces, If they knew It, they weren't going to ask It. So I don't know what they know; But I just as well you, from the record. It doesn't look good. (Tr. 480 - 81)

At that point, the Court summoned Gonzales to the witness stand. Both counsel and the Court questioned him. Gonzales admitted telling AUSA Byrne and the government agents about Sanchez' and Hernandez' alleged Involvement In the "other

criminal activity." (Tr. 496 - 97). He also testified that he told AUSA Byrne and the agents that the transaction occurred between June and July of 1994. (Tr. 497). Gonzales expressly contradicted AUSA Byrne's explanation that the "other criminal activity" was related to the charged offenses:

Q. Those ten kilos were not related to your transaction in this case involving the 600 kilos and the 20,000 pounds of marijuana, were they?

A. Correct, they were not related.

Gonzales then testified that in 1993 he also participated with Sanchez and Hernandez "in a conspiracy to import cocaine from Venezuela, and the AUSA knows that." (Tr. 502).

"I told Mr. Byrne in '93, when I met Mr. Sanchez, that it was for the purpose of bringing in a load of cocaine through Port Everglades with the Sealand Company." (Tr. 5085 See also id at 516). Gonzales first told AUSA Byrne about the 1993 episode, involving 500 kilograms of cocaine, on Friday, July 5, 1996. (Tr. 508 - 09).

Gonzales then revealed that a second meeting with AUSA Byrne and agent Deadwyler occurred on Sunday, July 7, 1996. (Tr. 507). This meeting had not previously been disclosed when AUSA Byrne assured the Court that he had not enough of an "opportunity" to

debrief Gonzales to learn more details about his criminal past. At the conclusion of Gonzales' testimony the [defendants] Sanchez and Hernandez renewed their mistrial motions. (Tr. 522 - 23).

Thereupon' the District Court ruled that "It's clear to me that there has been a discovery violation; and a severe one, an egregious one," since the defense would not have "walked Into an open trap" knowingly. (Tr. 523). The Court ruled that the evidence of Gonzales' prior drug dealing was required to be disclosed under Brady [v. _ rY and] as Impeachment evidence. (Tr. 523). Although the Court granted the mistrial, It refused to find that AUSA Byrne's conduct was "willful."

I do not find that Mr. Byrne committed a willful violation. I think that he was negligent In not pursuing the matter further with the witness. I think that he misunderstood or should have or more carefully considered defense counsels' request, which was most articulate and most detailed about there must have been more Information as regarding the witness' Involvement In other criminal activity as a result of the 15th supplemental discovery response.

Mr. Byrne was thinking other criminal activity. Mr. Rabin was thinking, as an experienced defense attorney, there must be more to this, must have taken more notes.

And I afford you, Mr. Byrnes, the benefit of the doubt. I think that he got too Involved In his thinking about all of his transcripts and all his witnesses and cooperation and videotapes. And I think that he just lost focus about what defense attorneys really need when they need to know everything, good or bad, about their client.

So I do not find a willful violation. I find that Mr. Byrne was simply negligent In his performance of his discovery obligations. (Tr. 524).

On July 23, 1996, Sanchez filed a motion seeking a dismissal of the indictment under the Double Jeopardy Clause of the Fifth Amendment, arguing that contrary to the Court's rulings - the mistrial was caused by the Intentional conduct of AUSA Byrne. The Court denied the motion on July 30, 1996, reiterating It's view that AUSA Byrne was merely negligent.

The Court scheduled the retrial for July 30, 1996. On July 19, 1996, AUSA Byrne, having benefitted from the mistrial as to learning the defenses of the defendants Sanchez and Hernandez, filed a pre-trial motion announcing that he did not Intend to call any of the Informants at the retrial and was likewise seeking an order limiting defense counsels' right to Inform the jury about their misconduct during their respective participation In "Operation Skymaster." After Jury selection, the District Court granted the government's mot ton In limine, stating: "I'm

not going to allow cross-examination of the agent about how bad non-testifying witnesses are." (Tr. 10 -13).

Sanchez and Hernandez went to trial for a second time between July 30 and August 6, 1996. On August 6, 1996, the Jury convicted Sanchez on Counts 1 — 3 and 5, while acquitting him of Count 4. The Jury convicted Hernandez of Counts 1, 3 - 5, while acquitting him of Count 2.

On December 3, 1996, the District Court sentenced Sanchez to life Imprisonment and five years of supervised release. On December 4, 1496, the District Court sentenced Hernandez to a term of Imprisonment of 235 months, a special assessment of $200.00, and a consecutive term of five years supervised release.

STATEMENT OF THE FACTS

In the summer of 1994, the United States Customs Service established an undercover operation In Mobile, Alabama. Special agent James C. Tanner posed as the owner of a freight company, Coastal Freight, who specialized In the transportation of narcotics. (Tr. 10 -34). The operation relied upon the work of three confidential Informants ~ Joel Guerrero ("Joel"), Adolfo Asonte ("Danny"), and Leonardo Mirelli ("Frank").

As noted herein above, the government chose not to call any Informants which the District Court allowed the jury to hear was

that Customs Service had paid the three informants over one million ($1,000,000.00) dollars for their undercover work In other cases and that the informants would receive additional rewards for their work in this case. (Tr. 10 -65).

Special agent Tanner was introduced to Odilio Gonzales on June 16, 1994, in Mobile, Alabama informants "Danny" and "Joel." (Tr. 10 -35, 62 - 63). Gonzales needed the undercover agent's services to transport cocaine Into the United States from Colombia. (Tr. 10 -35).

A second meeting between Gonzales and agent Tanner occurred on August 1, 1994, also in Mobile, Alabama. Agent Tanner's "understanding" was that "a representative of the owners of the cocaine in Colombia was coming down to meet with us." (Tr. 10 103). Gonzales drove to the meeting from Miami, Florida and brought with him Hernandez. (Tr. 10 -36). The meeting was videotaped. (Tr. 10 -37 - 41: Gov. Exh. 4, 4—A and 4B). At the beginning of the meeting, Hernandez asked If anybody there was from the police. (Tr. 10 - 44). The parties then discussed bringing a cocaine shipment into the United States from Bejuena Ventura, Colombia. Hernandez stated that he was working for the "cartel." (Tr. 10 - 44).

Agent Tanner agreed to use his company as the cosignee for the shipment of cocaine. The remainder of the meeting primarily involved a discussion of the bills of lading and other documents

needed to process the shipment through Customs. (Tr. 10 - 46). Although the initial discussion Involved 500 kilograms, Gonzales stated that since this was his first shipment, only 300 kilograms would be sent. (Tr. 10 - 44).

Agent Tanner testified' with no objection; that he believed that Gonzales was acting as a "broker" in the transaction for the real owners. "I saw Mr. Lazaro as being a representative of the owner, I put him above Mr. Odlilo." (Tr. 10 - 48). Since the government had now chosen not to call any of the Informants as witnesses, Gonzales became the government's star witness. He Identified both Hernandez and Sanchez. (Tr. 132 - 33). He knew Sanchez as "El Guajiro." (Tr. 133). Before going to the August 6, 1994 meeting, Gonzales testified that he discussed the cocaine transaction with Sanchez and that Sanchez was the one with contacts In Colombia. (tr. 134, 142).

In February 1995; Sanchez called Gonzales concerning a problem with a container of cocaine In the Port of Miami. Gonzales discussed the matter with "Danny" and later agent Tanner. Agent Tanner told Gonzales that he knew a (fictitious) corrupt U.S. Customs agent named "Arnold" who could be bribed for Information. (Tr. 146 - 47). "Danny" reported back to Gonzales that the container had been seized by Customs. (Tr. 147 - 48). The container In fact was seized by Customs and contained 573 kilograms of cocaine. (Tr. 142 - 48, Tr. 12 - 22).

Gonzales and Sanchez met the next day in the parking lot of a restaurant. Sanchez wanted proof of the seizure. Gonzales thereafter contacted agent Tanner. In a taped conversation, agent Tanner told Gonzales that they needed to pay "Arnold" $5,000.00 In exchange for Custom's documentation establishing that the U.S. Customs Service had In fact seized the container. (Tr. 51 - 53). Gonzales collected the money to pay "Arnold". Sanchez gave him $2,000.00; Hernandez gave $1,000.00; Gonzales contributed $1,000.00; and agent Tanner contributed the remaining $1000.00. (tr. 150). Gonzales gave "Danny" the $4,000.00 he had collected (Tr. 150). "Danny" then gave Gonzales the documents and Gonzales gave them to Sanchez. (Tr. 152).

Meanwhile, In late 1994, discussions began concerning a plan to smuggle 20,000 pound of marijuana from Colombia through the Port of Miami. (Tr. 156 57). Gonzales again enlisted the help of agent Tanner. Gonzales testified that he received a bill of lading for the shipment from Sanchez. "Danny", however. wanted to meet with Sanchez to discuss the shipment, and a meeting was convened In a hotel room on June 1. 1995. (Tr. 158 - 161).

The meeting was video-taped. (Tr. 33 - 34). The plan was to pay "Arnold" between $200,000.00 - $300,000.00 for allowing the shipment through the Port of Miami. (Tr. 161 - 633. In Sanchez' presence, "Danny" and Gonzales talked about weighing the 20,000 pounds of marijuana. Sanchez stated that he believed there would be 10,000 bales each weighing two pounds. The group

also talked about who was going to be In the warehouse where the marijuana would be unloaded. Sanchez did not want anyone else present. He did not mix money and merchandise. The group also discussed how to dispose of the fruit pulp used to conceal the marijuana. They indicated that they could not throw It Into the sewer, because It would clog the sewer and that was how others had been caught.

On June 2, 1S95, the vessel The Velma Lykes arrived In Miami with 160 drums of guava and mango pulp. Of the 160 drums, 55 actually contained marijuana. (Tr. 56). The container carrying the drums was delivered to Gonzales' warehouse late that day. (Tr. 162 - 65). "Danny", "Joel", Gonzales, and Hernandez were present and portrayed on a videotape. (Tr. 164 - 65). Inside the warehouse, Hernandez was seen helping unload the marijuana from the drums. (Tr. 167, 175 - 77).

Hernandez then drove from the warehouse In a truck containing a portion of the marijuana. (Tr. 169 -73). He spotted government surveillance and took evasive action. (Tr. 132). He then got out and made some telephone calls. (Tr. 133). Thereafter, he abandoned the truck a block from Sanchez' home. (Tr. 138).

Gonzales testified that he received a call from Sanchez Indicating that Hernandez was being followed and abandoned the truck. (Tr. 184)-. Gonzales drove to the location where the

truck was abandoned and was arrested shortly thereafter, as was Hernandez. (Tr. 185). When Hernandez was arrested, he made post-arrest statements. He denied ever being In Alabama, denied knowing the undercover agent and denied knowing anything about cocaine or marijuana. (Tr. 56).

REASONS FOR GRANTING THE WRIT

THE LOWER COURT'S HOLDING THAT THE GOVERNMENT'S GOADING THE PETITIONER INTO SEEKING A MISTRIAL WAS NOT INTENTIONAL, BUT INSTEAD MERE NEGLIGENCE IS IN CONFLICT WITH THIS COURT'S DECISION IN OREGON V. KENNEDY, 456 U.S. 667 (1982).

The Double Jeopardy Clause of the Fifth Amendment bars a re-trial following a mistrial, even where the defendant moves for the mis-trial, when the government has acted In bad faith to cause the mistrial. **Oregon v. Kennedy,** 456 U.S. 667, 676, 102 S.Ct. 2083, 2089 (1982).

Normally, this Court has long established that when a criminal defendant moves for mistrial, or otherwise consents to It's declaration, the Double Jeopardy Clause would not bar retrial. **United States v. Scott,** 437 U.S. 82, 93, 98 S.Ct. 187, 2195 (1978). This doctrine of manifest necessity accommodates both the defendant's right to have his trial completed by the first competent tribunal and the public's Interest-In "fair trials designed to end In Just Judgments." **Wade v. Hunter,** 336

U.S. 684, 689, 69 S.Ct. 834, 837 (1949); see also Walker v. Weldon, 744 F.2d 775 (llth Cir. 1984). Here In the case sub judice, the government was the catalyst that "goaded" the petitioner Into seeking a mistrial. Yet, the government benefitted from the partial trial proceedings by learning that the petitioner had planned to attack the credibility of the informants whom had participated In "Operation Skymaster" which was the very operation that yielded the arrest of the petitioner.

With this knowledge, the government elected to not call the informants as witnesses as It was well aware that there existed too many idiosyncracies regarding "Operation Skymaster" and the anomolous conduct of many of the informants. The government was well aware that the defendants were going to impeach these informant witnesses on these facts. Thus, the government filed a motion in limine which wars to limit the defense cross-examination and/or examination of the agent witnesses as to the purported misconduct of the informants whom were not being called. The Court granted this motion.

The Double Jeopardy Clause of the Flfth Amendment protects a person from being "twice put in jeopardy of life or limb" for the same offense.

This Court has enumerated several purposes for this protection: (1) to ensure the finality of Judgments in criminal cases; (2) to avoid compelling a defendant to live in a constant

state of anxiety and Insecurity attendant with successive prosecutions for the same offense; (3) to avoid giving the prosecution an unfair opportunity to retry the [defendant] using Information gained from the first trial concerning the strengths and weaknesses of [It's] case; (4) to ensure that the defendant's right to have his fate decided by the first Jury empaneled Is protected; and (5) to avoid the Imposition of multiple punishments for the same offense. **United States v. DiFrancesco,** 449 U.S. 117, 127-29, 101 S.Ct. 426, 432-33 (1980). See also **Green v. United States,** 355 U.S. 184, 187-88, 78 S.Ct. 221, 223-24 (1957).

Here in the case sub justice, the lower Court failed to adhere to this Court's decision **Oregon v. Kennedy**. Had the Court of Appeals correctly applied **Oregon v. Kennedy** to the analogous facts at bar, the Court would have severed the conviction and sentence and ordered dismissal of the indictment on Double Jeopardy grounds.

Here, the Eleventh Circuit Court of Appeals affirmed without opinion the petitioner's conviction and sentences. Thus, the petitioner can only presume that It summarily affirms the District Court's orders which are Incompatible with this Court's decision In **Oregon v. Kennedy.** Thus, this Court should grant review sub nom to any pending cases whereby certiorari has already been granted that are factually similar.

CONCLUSION

For these reasons, the petitioner requests that his Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit be hereby granted.

Respectfully submitted,

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March 3, 1998

APPENDIX

(DO NOT PUBLISH]

IN THE UNITED STATES COURT OF A

FOR THE ELEVENTH CIRCUTT

No. 96-5540

D. C. Docket No. 95-421-CR-LCN

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AUGUSTIN SANCHEZ, LAZARO HERNANDEZ,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(December 15, 1997)

Before DUBINA, Circuit Judge, FAY and KEITH*, Senior Circuit Judges.

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*Honorable Damon J. Keith, Senior U.5. Circuit Judg. for the Sixth Circuit, sitting by designation.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1. [1]

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[1] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) the judgment of the district court ia based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) a summary Judgment, directed verdict, or Judgment on the pleading. is supported by the record;

(e) the judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the Judgment or order may be affirmed or enforced without opinion.